The Arrow Line, Inc./Coach USA and The Amalgamated Transit Union Local 1342. Case. 34-CA-9388

August 21, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On June 14, 2001, Administrative Law Judge Michael A. Marcionese issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.

The complaint alleges that The Arrow Line, Inc. (the Respondent) failed to properly calculate vacation pay for its mechanics and cleaners under its 1999 collective-bargaining agreement and that this failure constitutes a midterm modification in violation of Sections 8(a)(5) and (1) and 8(d). In adopting the judge's dismissal of the complaint under Section 10(b), we find the following facts to be particularly significant. The Respondent has paid its nondriver employees (i.e., mechanics and cleaners) vacation pay on the basis of 40 hours per week since 1989 when the Respondent acquired the company from another bus line. Although the parties' 1996 agreement increased vacation pay from 40 to 50 hours, the Respondent viewed the increase as applicable only to drivers, who generally worked 10 more hours a week than Respondent's nondriver employees. Accordingly, during the term of the 1996 agreement, the Respondent adhered to its long-standing practice of calculating vacation benefits for its mechanics and cleaners on the basis of a 40-hour week. The Respondent continued to adhere to this practice under its 1999 agreement, which also called for paying vacation benefits on the basis of a 50-hour week. No employee or union representative complained about this practice during the term of the 1996 agreement or addressed it in any way during negotiation of the 1999 agreement. Moreover, the local union president received vacation pay on the basis of 40 hours per week throughout the period covered by the 1996 and 1999 agreements. Under these circumstances, the Union had clear and unequivocal notice of the Respondent's vacation pay practice long before February 23, 2000, the beginning of the applicable Section 10(b) period.

We agree with the judge that this case is akin to *Continental Oil Co.*, 194 NLRB 126 (1971).[1] In that case, the employer implemented a method of allocating overtime, which allegedly violated its collective-bargaining agreement, more than 6 months before the filing of the charge. The employer continued to follow this same method during the Section 10(b) period. The Board found that the employer's mere adherence to its method of allocating overtime established outside the Section 10(b) period could not constitute a midterm modification within the 10(b) period. The Board therefore dismissed the complaint as time-barred. Similarly, here, the Respondent's conduct during the Section 10(b) period was identical to its decade-long practice. There is no allegation of a new change in the Respondent's method of calculating vacation pay during the relevant Section 10(b) period.[2]

[1] We respectfully find our dissenting colleague's attempt to distinguish *Continental Oil Co.* on the basis that the complaint in that case alleged a "change in method" of allocating overtime, rather than "separate and distinct allegedly unlawful individual assignments of overtime" to be unavailing. To the contrary, in that case the General Counsel argued that the complaint was not barred under Sec. 10(b) because the employer *applied* its interpretation of the contract during the 6 months prior to the filing of the charge. The Board disagreed and adopted the ALJ's finding that:

> [t]he application of the Company's view is not in itself a "change." In order to establish a "change", the General Counsel would have to go back to 1964, long before the period permissible under Section 10(b). Whether or not Respondent's method of allocating overtime violates the terms of the contract, it is clear that Respondent has not changed its method of doing so since November 20, 1968, the beginning of the Section 10(b) period.

Id. at 129. Accordingly, the Board explicitly found that "[t]o the extent that any of the actions taken by Respondent within 6 months of the filing of the charge could be construed as a new or independent act, there has not been shown such a departure from the established method of allocating overtime as would constitute unilateral action which violates Section 8(a)(5)." Id. at 126. In other words, it is the alleged change itself that constitutes the violation. Thus, merely adhering to a method of calculating vacation pay established outside the Sec. 10(b) period does not constitute an actionable unilateral change.

In the present case, it likewise is the alleged change in the Respondent's method of calculating vacation pay that originally may have given rise to an unfair labor practice. That change, however, took place outside the relevant Sec. 10(b) period. Here, as in *Continental Oil*, no change took place after that one act. As our dissenting colleague concedes, the act of inadvertently leaving the vacation benefits out of the contract took place far before the relevant statutory limit. The Respondent's continued application of this method for payment of vacation pay does not give rise to a continuing violation here, just like the analogous situation did not give rise to a continuing violation in *Continental Oil*. Our dissenting colleague's reliance on *Farmingdale Iron Works*, 249 NLRB 98 (1980), does not change this.

[2] See also *Park Inn Home For Adults*, 293 NLRB 1082 (1989) (holding that Sec. 10(b) barred a finding that an employer violated the Act by failing to make contributions to benefit funds where the charge

Therefore, the complaint is time-barred under Section 10(b).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and the complaint is dismissed.

Dated, Washington, D.C., August 21, 2003

Peter C. Schaumber, Member

R. Alex Acosta, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

The Respondent has continuously failed to pay its mechanics and cleaners their full contractual vacation pay since 1996. The complaint alleges that this failure since on or about February 15, 2000 has been without the Union's consent and that it constitutes a midterm modification of the collective-bargaining agreement in violation of Section 8(a)(5) and (1) and 8(d) of the Act.[1] The complaint is not time-barred under Section 10(b) of the Act.[2] Thus, my colleagues have erred in dismissing the complaint on 10(b) grounds.

I. FACTS

The parties have had successive collective-bargaining agreements since 1989, covering all full time bus drivers (drivers), mechanics, and washers (cleaners). (The current agreement is for January 19, 1999, through January 18, 2004). Until January 1996, the agreements provided that the Respondent would pay all unit employees 40 hours pay for each week of their vacation. In the 1996 collective-bargaining agreement, the parties negotiated an increase in the weekly amount of vacation pay, from 40 hours to 50 hours. Thus, starting in January 1996 and continuing to the present, the collective-bargaining agreements have provided that the Respondent would pay "all employees covered by this agreement" (without reference to specific job classification) 50 hours pay for each week of their vacation. In practice, however, the Respondent continued to pay its mechanics and cleaners only 40 hours pay per week of vacation, while paying its drivers the contractually specified 50 hours pay. Local Union President Holiner Miliner was one of the cleaners who received only 40 hours pay for vacation during this time.

Nobody, however, complained about the Respondent's failure to pay the mechanics and cleaners the contractually specified 50 hours pay for vacation until June 16, 2000,[3] when cleaner Jose Rodriquez, who had recently read the collective-bargaining agreement, complained to the Respondent that he had received only 40 hours instead of 50 hours of vacation pay for his recently completed 1-week vacation. Rather than pay Rodriquez the additional 10 hours of vacation pay called for in the collective-bargaining agreement, the Respondent instead sent notices dated June 19 to all mechanics and cleaners, with a copy to the Union, stating:

> Upon reviewing the Union Contract we have noticed that the section for **VACATION BENEFITS HAS BEEN INADVERTENTLY LEFT OUT OF THE CONTRACT.**[4] We apologize for any inconvenience this may have caused. **VACATION** benefits for mechanics and cleaners is [sic.] as follows: [40 hours of pay per week]. [Emphases in original.]

The Union filed the instant unfair labor practice charge on August 11. The complaint issued on October 25. The complaint alleges in pertinent part that since on or about February 15 the Respondent has failed to continue in effect the contractual vacation benefit provisions, by unilaterally changing vacation benefits for the mechanics and cleaners, without obtaining the Union's consent and without providing the Union with prior notice and an opportunity to bargain about the change, in violation of Section 8(a)(5) and (1) and 8(d) of the Act.

The Respondent's answer to the complaint asserts in pertinent part that the unfair labor practice charge is time-barred by Section 10(b).[5]

was filed more than 6 months after the expiration of the applicable collective-bargaining agreement that initially created the allegedly breached obligation and more than 6 months after the union learned of the employer's action).

[1] Under Sec. 8(d) of the Act, no party to a collective-bargaining agreement can be compelled to discuss or agree to a midterm modification of a collective-bargaining agreement, and, accordingly, a proposed modification can be implemented only if the other party's consent is first obtained. *Abbey Medical/Abbey Rents*, 264 NLRB 969, fn. 1 (1982), enfd. 709 F.2d 1514 (9th Cir. 1983) (mem.).

[2] Sec. 10(b) of the Act provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

The charge was filed on August 11, 2000. The judge found that a copy of the charge was served on the Respondent by fax and regular mail on August 22, 2001, and there are no exceptions to that finding.

[3] All the following dates are 2000 unless otherwise stated.

[4] This was false. Vacation benefits are set out, in full, in Article G3, VACATIONS, of the 1999-2004 collective-bargaining agreement.

[5] The Respondent's reference to the charge, rather than the complaint, in its 10(b) affirmative defense appears to have been inadvertent.

II. ANALYSIS AND CONCLUSION

The General Counsel has structured the complaint to comply with the requirements of Section 10(b) by limiting the chronological extent of the alleged unlawful activity to only that which occurred since on or about February 15—i.e., within about 6 months prior to the August 22 service of the charge on the Respondent. Nevertheless, the judge has recommended that the complaint be dismissed on 10(b) grounds, and my colleagues have erroneously adopted that recommendation.

For the reasons discussed below, I find that in continuously failing to pay mechanics and cleaners their contractual 50 hours per week vacation pay, without obtaining the Union's consent, the Respondent has effected midterm modifications of the collective-bargaining agreement resulting in a series of continuing or recurring separate and distinct violations of Section 8(a)(5) and (1) and 8(d) of the Act. Litigation of any instances of such alleged misconduct occurring within the 6-month period prior to the August 22 service of the charge on the Respondent is not barred by Section 10(b).

A. Governing Principles

The procedural issue before us is primarily controlled by *Farmingdale Iron Works*, 249 NLRB 98 (1980), enfd. mem. 661 F.2d 910 (2nd Cir. 1981), and *King Manor Care Center*, 308 NLRB 884 (1992). Under *Farmingdale*, each failure during the term of an existing collective-bargaining agreement to pay contractually required periodic benefit fund payments within the 10(b) period constitutes a separate and distinct violation of Section 8(a)(5) and (1) of the Act. See *Chemung Contracting Corp.*, 291 NLRB 773 (1988), citing *Farmingdale*.

Under *King Manor*, it is unnecessary to consider when, if ever, the Union had clear and unequivocal notice that the Respondent would not abide by its contractual obligation to pay 50 hours vacation pay to the mechanics and cleaners. Where, as here, the charge was filed during the life of the collective-bargaining agreement, every failure to pay contractual vacation pay triggers a new limitations period and a charge is timely filed with respect to any such failure without regard to earlier failures to pay. Each failure to pay contractual vacation pay constitutes a separate and discrete violation independent of the evidence that may support earlier violations. Inasmuch as the instant case does not involve an alleged repudiation of the entire agreement but only an unlawful midterm modification of a particular provision, the continuing violation doctrine is applicable. Therefore, the charge filed on August 11 and served on August 22 is timely with respect to any failures to pay contractual vacation pay on or after February 22, 6 months prior to service of the charge. 308 NLRB at 887.[6]

Like the instant case, *Farmingdale* involved a charge filed during the term of an existing collective-bargaining agreement. It alleged the cessation of contractually required periodic benefit fund payments. Although the initial failure to make payments occurred more than 6 months before the charge was filed, the Board held that each failure to make the contractually required monthly benefit fund payments constituted a separate and distinct violation of the Respondent's bargaining obligation. Because the contract was still running, the Board found that General Counsel did not need to reach beyond the 10(b) period for evidence to support the charge; the alleged separate and distinct contract violations were provable by events occurring within 6 months of the filing of the charge. While concluding that Section 10(b) precluded any remedy for the failure to make payments *outside* the 6-month period preceding the charge, the Board nevertheless concluded that an unfair labor practice finding was not time-barred in its entirety:

> The Board previously has considered the application of Section 10(b) to the unilateral discontinuance, in the face of a bargaining obligation, of benefits that formerly were granted on a periodic basis. Thus, the Board has held that each denial of a merit increase to employees whose evaluations previously would have entitled them to such an increase constituted a separate and distinct violation of the Act which could be remedied upon the filing of a charge within 6 months after the denial of that particular increase. The Board further has held that the unilateral decision to discontinue making benefit fund contributions, like the failure to make periodic wage increases, constitutes a violation of Section 8(a)(5) of the Act. Accordingly, we conclude that each failure to make the contractually required monthly benefit fund payments constituted a separate and distinct violation of Respondent's bargaining obligation and, therefore, that any benefit fund payment [within the 10(b) period] is subject to the Board's remedial powers. [249 NLRB at 99; footnotes omitted.]

As seen, Sec. 10(b) may be invoked as an affirmative defense to act as a bar to the issuance of certain complaints, or particular allegations within a complaint, but it does not act as a bar to the filing of unfair labor practice charges themselves.

[6] The instant complaint alleges unlawful conduct beginning on or about February 15, within 6 months prior to the August 11 filing of the charge, rather than on or about February 22, within 6 months prior to the August 22 service of the charge on the Respondent. This is a minor and insubstantial error not involving a material issue. The Respondent would not be prejudiced by a finding of a violation a mere 7 days later than that alleged. *King Manor*, supra, 308 NLRB at 887.

B.. Application of Governing Principles

The principles set out in *Farmingdale*, *Chemung*, and *King Manor* are fully applicable here. The Respondent has apparently never paid the mechanics and cleaners the 50 hours per week vacation pay expressly owed to them ("all employees") under the express terms of the vacation provisions of the parties' collective bargaining agreements. Each time it failed to do so, it failed to comply with the terms of the agreement. Each such failure could be alleged as a separate and distinct violation. The complaint alleges as unlawful, however, essentially only those failures to abide by the contract during the 6-month 10(b) period prior to the August 22 service of the charge upon the Respondent. Under the above precedents, the complaint is therefore not barred by Section 10(b), and my colleagues have erred in dismissing the complaint on 10(b) grounds.

C. Inapplicable Cases

My colleagues adopt the judge's reliance on *Continental Oil Co.*, 194 NLRB 126 (1971), which was decided 9 years before *Farmingdale*. *Continental Oil* is inapposite and any reliance on it in this context is thus misplaced. The complaint there alleged that the employer violated Section 8(a)(5) and (1) by unilaterally *changing the method* for distributing overtime, despite the terms of an existing collective-bargaining agreement prescribing the method for doing so. The Board found that the alleged unilateral *change in method* was effectuated more than 6 months prior to the filing of the charge, and that the allegation was therefore barred by Section 10(b). The Board clearly demonstrated its focus on the allegedly unlawful change in method for distributing overtime rather than on separate and distinct allegedly unlawful individual assignments of overtime:

> To the extent that any of the actions taken by Respondent within 6 months of the filing of the charge could be construed as a new or independent act, there has not been shown such a departure from the established *method of allocating overtime* as would constitute unilateral action that violates Section 8(a)(5). [194 NLRB at 126; emphasis supplied.]

Indeed, the Board distinguished *Continental Oil* in *Farmingdale* itself, noting that the employer's adherence in *Continental Oil* to *a method* of calculating overtime that was established more than 6 months before the filing of the complaint did not constitute a unilateral change within the 10(b) period and (unlike the alleged violations in *Farmingdale*) was therefore not a continuing violation within the 10(b) period. 249 NLRB at 99, fn. 7.

Similarly, the Board expressly found *Continental Oil* "distinguishable and not on point" in *Abbey Medical/Abbey Rents*, supra, where the Board directly applied *Farmingdale* in finding that there was no 10(b) bar to allegations of failures to make contractually mandated fringe benefit fund contributions *during* the 10(b) period. The Board found, by way of comparison, that the employer in *Continental Oil* had "merely adhered to a method of calculating overtime established more than 6 months before the filing of the charge." 264 NLRB at 975.

The majority also relies on *Park Inn Home for Adults*, 293 NLRB 1082 (1989). That case is also fundamentally inapposite, and reliance on it here is thus misplaced. In *Park Home*, the complaint alleged, and the judge found, that the respondent violated Section 8(a)(5), (3), and (1) by failing since March 11, 1978 (6 months prior to the filing of the charge), to make contributions to the union's employee benefit funds. In finding these violations, the judge rejected the respondent's argument that the allegations were time-barred because it had ceased contributing to the funds before the 6-month limitations period in Section 10(b). The judge relied on *Farmingdale*, supra, to find that each failure to make the required payments within the 10(b) period was a separate actionable violation.

The Board reversed the judge. It noted that subsequent to the issuance of the judge's decision, the Board had issued *Chemung Contracting Corp.*, supra, in which the Board considered the application of *Farmingdale* to cases like *Park Home*, involving a charge of a unilateral change that is filed more than 6 months after expiration of the applicable collective-bargaining agreement that initially created the allegedly breached obligation. *Chemung* held that Section 10(b) bars a finding that an employer has violated the Act by failing to make contributions after the relevant collective-bargaining agreement has expired, when the charge is filed more than 6 months after expiration of the contract and the union had notice of the failure prior to the 10(b) period. Accordingly, applying *Chemung* rather than *Farmingdale*, the Board dismissed the allegations in question in *Park Home*.

Park Home is therefore fundamentally inapposite to the instant circumstances. Unlike in the instant case, where the August 11, 2000 unfair labor practice charge was filed and served on the Respondent *during* the term of the 1999-2004 collective-bargaining agreement (thus invoking the principles of *Farmingdale*), the September 11, 1978 charge in *Park Home* was not filed until almost *2 years* after the October 31, 1976 expiration of the collective-bargaining agreement (thus invoking the principles of *Chemung*).

D. Conclusion

Based on all of the above considerations, I would not dismiss the complaint on 10(b) grounds.

Dated, Washington, D.C. August 21, 2003

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

Darryl Hale, Esq., for the General Counsel.
Peter A. Janus, Esq. (Siegel, O'Connor, Schiff & Zangari, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Hartford, Connecticut, on March 8 and 9, 2001. The unfair labor practice charge was filed by the Amalgamated Transit Union Local 1342 (the Union) on August 11 and on October 25, 2000, the complaint and notice of hearing issued. The complaint alleges that the Respondent, the Arrow Line, Inc./Coach USA (the Respondent), has unilaterally changed the vacation benefits of its union-represented mechanics and washers since on or about February 15, 2000.[1] This conduct is alleged to be an unlawful midterm modification of the collective-bargaining agreement between the Respondent and the Union, under Section 8(a)(1), (5), and 8(d) of the Act, and a unilateral change, without notice and an opportunity to bargain, in violation of Section 8(a)(1) and (5). The Respondent filed its answer to the complaint on November 8, denying the unfair labor practice allegations and raising several affirmative defenses. Specifically, the Respondent asserted that the complaint was time barred by Section 10(b) of the Act; that any alleged unilateral change had been ratified by the Union; that the Union was estopped from alleging any unilateral change by its acceptance or acquiescence in the Respondent's past practice of calculating vacation benefits; and that the Union waived any claims it had against the Respondent's practice of calculating vacation benefits.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Waterford, Connecticut, is engaged in the interstate and intrastate transportation of passengers. The Respondent annually derives gross revenues in excess of $50,000 from its interstate transportation business, and performs services valued in excess of $50,000 in States other than the State of Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*[2]

The Union has represented a unit of bus drivers, mechanics, and washers[3] at the Waterford facility for many years. When the Respondent acquired this facility in January 1989 from Savin Bros. Bus Lines, it recognized the Union and adopted the existing collective-bargaining agreement with minor changes. The parties have negotiated a succession of collective-bargaining agreements over the years since 1989, with the current one in effect for the period January 19, 1999, through January 18, 2004. All of the contracts have contained a provision for vacation benefits for unit employees. From 1989 until January 1999, the contracts contained two-tier vacation benefits, one for employees hired before the January 19, 1989 acquisition by the Respondent, and one for those hired after that date. The pre-1989 employees had the option of receiving vacation pay on a mileage or hourly basis whereas those employees hired since the Respondent took over the business received vacation pay on an hourly basis. As part of the negotiations for the current agreement, the parties agreed to eliminate the two tiers so that all employees would now receive vacation pay based on their hourly rate. The dispute which led to the filing of the instant charge involves the number of hours the Respondent uses to calculate the weekly vacation pay for the mechanics and cleaners in the unit.

It is undisputed that all unit employees who were hired after January 19, 1989, whether a driver, a mechanic, or a cleaner, received 40 hours' pay for a week of vacation from 1989 until the January 19, 1996 effective date of the immediately preceding contract. In the 1996 agreement, the parties negotiated an increase in the weekly amount of vacation pay from 40 hours to 50 hours. The parties disagree whether this increase applied to all second-tier employees or only drivers. The vacation provision that appears in the 1996 contract reads as follows:

VACATIONS

ARTICLE G 3

Section 7. All employees covered by this agreement receive vacation with pay outlined in the following schedule. Vacations will commence on Friday.

Vacation schedule for employees hired prior to 01/19/89

Seniority of	*Number of weeks*
One Year	1

[1] All dates are in 2000 unless otherwise indicated.

[2] The facts are largely undisputed. Any factual disputes that are critical to resolution of the issues here will be discussed in the next section of this decision.

[3] The contract also refers to washers as cleaners. This latter term was the one used by the parties at the hearing and will be used in this decision to refer to those employees who clean the buses.

Two years	2
Seven Years	3
Fifteen Years	4
Twenty Five Years	5

Vacation pay for regular spare board operators will be 1500 miles per week based on his or her prevailing mileage rate. A regular run operator will receive pay based on what his/her regular run would pay as long as the regular run operator has operated a regular run for the preceding four (4) months.

Vacations [sic] schedule for employees hired after 1/19/89:

Seniority of	*Number of weeks*	*Hours of Pay*
One Year	1 Week	50
Two Years	2 Weeks	100
Seven Years	3 Weeks	150
Fifteen Years	4 Weeks	200
Twenty Five Years	5 Weeks	250

There is no dispute that, during the term of the 1996 contract, the Respondent continued to pay mechanics and cleaners vacation pay based on 40 hours per week, rather than the 50-hour week set forth in the agreement. There is also no dispute that no employee or representative from the Union complained or protested, during the term of the 1996 contract, that the mechanics and cleaners were not receiving the 50 hours per week vacation pay set forth in the contract.

In October 1998, the Respondent's president, Raynald Dupuis, contacted the Union's business agent, Garfield Rucker, and asked to open negotiations early for a new contract.[4] Dupuis testified that he wanted early negotiations because the Waterford employees were falling behind employees at the Respondent's other divisions in terms of their wages and benefits.[5] According to Dupuis, the Respondent has had a policy of equalizing wages and benefits at its three divisions to avoid dissension within the company. A comparison of the 1996 and 1999 contracts in evidence shows that, in fact, the parties negotiated substantial increases in wages for both drivers and nondrivers in the 1999 agreement.

The parties commenced negotiations in mid-October 1998 and reached agreement on the current contract in about 3 months. Richard Murphy, its International representative, and the Local Union's executive board, which included Business Agent Rucker and Local President Holiner Miliner, represented the Union in these negotiations. Miliner, a cleaner in the Waterford facility, was the only member of the executive board who was employed by the Respondent in a nondriving position. Dupuis and Colin Johnson, the general manager of the Waterford facility, represented the Respondent.[6] Johnson and Murphy were the chief spokespersons for their respective parties.

The only change negotiated with respect to the above vacation provision was elimination of the two-tier system and the language relating to the mileage-based vacation benefits applicable to the top tier.[7] At the time, the top tier vacation schedule applied to only one employee, a driver.[8] There is no dispute that the Union proposed this change and that the Respondent readily agreed. Although there is some dispute as to what was said at the time, there is no dispute that the discussion was very brief and that there was no separate discussion regarding vacation benefits for mechanics and cleaners. The contract that resulted from these negotiations contained the following vacation provision at article G 3, Section 7:

> *Section 7.* All employees covered by this agreement receive vacation with pay outlined in the following schedule. Vacations will commence on Friday.

Seniority of	*Number of weeks*	*Hours of Pay*
One Year	1 Week	50
Two Years	2 Weeks	100
Seven Years	3 Weeks	150
Fifteen Years	4 Weeks	200
Twenty Five Years	5 Weeks	250

The Respondent drafted the final agreement that contained this language. In March 1999, Johnson met with the Union's executive board in a conference room at the Waterford facility to sign the agreement. He signed on behalf of the Respondent and Miliner and Rucker signed on behalf of the Union. The signed contract was then sent to Dupuis at his office in East Hartford, Connecticut, where he added his signature. Dupuis and Johnson admitted reading the language in article G 3, section 7 before signing the agreement.

There is no dispute that from January 1999 until June 2000, the Respondent continued to pay mechanics and cleaners vacation pay on the basis of a 40-hour week, notwithstanding the language quoted above. There is also no dispute that, prior to June 16, no employee or representative from the Union, including Miliner, ever complained or protested that the mechanics and cleaners were not receiving the 50 hours per week vacation pay set forth in the contract.

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[4] The 1996 collective-bargaining agreement was not due to expire until January 18, 2000.

[5] The Respondent operates three facilities in Connecticut, all unionized.

[6] Donna Kitlinski, who preceded Johnson as the general manager in Waterford, was also present for one or more sessions in late 1998. Johnson started working as the general manager in October 1998 and Kitlinski retired in December 1998. Kitlinski was on sick leave for much of the transition period.

[7] The parties also agreed to eliminate a similar two-tier wage schedule and mileage-based pay for all drivers. Under the 1999 contract, all unit employees receive an hourly rate of pay.

[8] Kitlinski, who worked for Savin Bros. until 1989 and had been the Waterford general manager since the Respondent acquired the facility that year, testified that there was at least one garage employee in the unit, Norm Matthieu, who had a seniority date before January 19, 1989. The Respondent's payroll records in evidence show that Matthieu, an active employee at the time of the hearing, received vacation pay during the 1996 contract based on a 40-hour week.

On June 16, Jose Rodriquez, a cleaner in the unit who has since become the Union's steward, received his pay for the 1-week vacation he took June 2 through 8. Coincidentally, he happened to have recently read the collective-bargaining agreement during a slow period at work. When he received his check with 40-hours pay, he recalled having seen the contract's vacation clause that said, "all employees covered by this agreement receive" 50 hours pay per week of vacation. Rodriquez brought his check and the contract to his supervisor, James Sardinha, and inquired why he didn't get the 50 hours called for in the contract. According to Rodriquez, Sardinha read the contract clause and told Rodriquez that he would discuss it with Cindy, who handles payroll, and get back to him. Sardinha later told Rodriquez that he had talked to Cindy and that Rodriquez would be getting his money in the next check.[9] On the same day, Rodriquez signed his timesheet for the week ending June 15, adding a note about the additional vacation pay he believed he was owed and attaching a copy of the contract's vacation provision. There is no dispute that Sardinha submitted this material to payroll. Johnson and Dupuis admitted being aware of Rodriquez request for the 50 hours vacation pay in mid-June.

Rodriquez testified that when he got his next paycheck, he did not get the additional vacation pay. Instead, he and the other mechanics and cleaners in Waterford received the following notice from Kathy Morin, director of human resources, dated June 19:

> Upon reviewing the Union Contract we have noticed that the section for **VACATION BENEFITS HAS BEEN INADVERTENTLY LEFT OUT OF THE CONTRACT**. We apologize for any inconvenience this may have caused. VACATION benefits for mechanics and cleaners is as follows:

Seniority of	*Numbers of Weeks*	*Hours of Pay*
One year	1 week	40
Two years	2 weeks	80
Seven years	3 weeks	120
Fifteen years	4 weeks	160
Twenty Five years	5 weeks	200

The notice indicates that a copy was sent to the Union. Morin testified that, either the day before or the same morning that the notices were sent with the paychecks to Waterford, she mailed a copy of the notice to Rucker at a residence address she obtained from the payroll administrator. Rucker acknowledged receiving a copy of this notice, but could not recall whether he received it from the Respondent or one of the employees. According to Rucker, Rodriquez' complaint and this notice were the first indication he had that the Respondent was not paying mechanics and cleaners 50 hours per week of vacation. Although Rucker had previously worked for the Respondent as a bus driver in the unit, he has worked for another employer since 1997. Miliner, the Local president and a member of the Union's negotiating committee who signed the contract on behalf of the Union, worked as a cleaner in the unit at Waterford. It appears from the Respondent's payroll records that he received vacation pay during the term of the 1996 and 1999 contracts based on a 40-hour week. He did not testify at the hearing and his absence was never explained.

It is undisputed that there were no discussions between the Respondent and the Union regarding the subject of vacation benefits for mechanics and cleaners outside of negotiations for the 1996 and 1999 collective-bargaining agreements. As noted previously, the discussions regarding vacation benefits during negotiations were general in nature and did not focus on drivers vs. nondrivers. The Respondent's witnesses did concede at the hearing that the schedule of vacation benefits for mechanics and cleaners contained in Morin's June 19 notice had not existed in this format before June 19, although this schedule reflected the Respondent's actual practice since 1989 when it acquired the facility.

B. Analysis

The General Counsel alleges that the Respondent's failure to pay the mechanics and cleaners in the Waterford unit vacation benefits based on a 50-hour week constituted a midterm modification of the collective-bargaining agreement in violation of Section 8(a)(1) (5) and 8(d) of the Act. The plain language of the 1999 contract, quoted above, says that "all employees covered by the agreement" receive vacation with pay in accordance with the published schedule. That schedule is based on a 50-hour week. Because the mechanics and cleaners are expressly covered by the agreement, the Respondent's failure to pay them in accordance with that schedule would seem to be a clear modification of the contract. Because there is no evidence that the Respondent ever obtained the Union's consent to its different treatment of the mechanics' and cleaners' vacation pay, an unfair labor practice finding would seem inescapable. The Respondent argues, to the contrary, that the contract doesn't really mean what it says. The parties understood that "all employees" actually means drivers. According to the Respondent, the mechanics and cleaners have always received vacation based on a 40-hour week, even after the parties negotiated an increase to 50 hours in the 1996 contract. That increase, according to the Respondent, was based on the fact that drivers typically work much more than 40 hours a week. Mechanics and cleaners, on the other hand, generally average no more than 40 hours. The 1999 contract did not change this aspect of vacation benefits when it eliminated the top tier and the mileage rate. In the Respondent's view, the Union's acquiescence in the Respondent's practice of calculating vacation pay for mechanics and cleaners at less than what the contract would seem to require shows that the Union had the same understanding that the contract schedule only applies to drivers. These arguments advanced by the parties raise issues of contract interpretation, parol evidence and waiver. However, I find it unnecessary to resolve those issues because I find that the complaint allegations are time-barred under Section 10(b) of the Act.

[9] Sardinha acknowledged having a conversation with Rodriquez about his vacation pay in June. According to Sardinha, he merely told Rodriquez, "[I]f Arrow Line owes you the money, you will get it. If they don't, you won't."

Section 10(b) of the Act precludes the issuance of a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon" the charged party. Although the General Counsel may rely on evidence outside the 10(b) period as "background," he is barred from bringing any complaint in which the operative events establishing the violation occurred more than 6 months before the unfair labor practice charge has been filed and served. *Allied Production Workers Union Local 12 (Northern Engraving Corp.)*, 331 NLRB 1, 2, (2000), and cases cited therein. The statute of limitations under Section 10(b) begins to run, however, only when a party has "clear and unequivocal notice" of a violation of the Act. Id. Notice can be actual or constructive. Thus, the Board has found sufficient notice to start the limitations period where a party, "in the exercise of reasonable diligence, should have become aware" of facts indicating that the Act had been violated. *Moeller Bros. Body Shop,* 306 NLRB 191, 192–193 (1992). Accord: *Carrier Corp.*, 319 NLRB 184, 190–193 (1995). The burden of showing that a charging party was on notice of a violation of the Act is on the Respondent. *A & L Underground*, 302 NLRB 467, 468 (1991).

The charge here was filed on August 11, 2000, and a copy was served on the Respondent by fax and regular mail on August 22, 2000. To satisfy its burden under Section 10(b), the Respondent had to show that the Union knew or could have known by the exercise of reasonable diligence, before February 23, 2000, that the Respondent was not paying vacation benefits in accordance with the terms of the agreement. Because there is no dispute that the Respondent never paid mechanics and cleaners 50 hours per week of vacation, and because the Local president was himself a member of the bargaining unit who would be directly affected by the alleged unfair labor practice, I find that the Union had clear and unequivocal notice of a violation long before this date. There can be no question that Miliner, as a union officer, a participant in the negotiations which resulted in the contract provision at issue and a cleaner in the bargaining unit, was a witness likely to have knowledge of the matters at issue in this proceeding. As an officer of the Charging Party, it may reasonably be assumed that he would be favorably disposed to the Charging Party. I must infer, from the General Counsel's failure to call Miliner as a witness, that his testimony would have been adverse to the Charging Party's interest. *Grimmway Farms*, 314 NLRB 73 fn. 2 (1994).

It may be inferred that, had Miliner testified, he would have confirmed what the Respondent's payroll records show, i.e., that he received vacation pay on the basis of 40 hours and not 50 hours a week throughout the period covered by the 1996 and 1999 contracts. He would, thus, have contradicted the testimony of Rucker that the Union did not know that the Respondent was not paying the contractual rate for vacation pay until Rodriquez complained in June. Miliner would also have corroborated the testimony of the Respondent's witnesses that he never complained or protested that the Respondent was not paying him the proper amount of vacation pay. The General Counsel argues that the Union can't be charged with knowledge of the contents of the Respondent's payroll and personnel records showing the allegedly incorrect amount was paid in 1998, 1999, and 2000 because the Union had not seen these records. This misses the point. Miliner certainly saw his paycheck when he received vacation pay and had to have known he was receiving only 40 hours pay for each week of vacation. Because he was at the negotiations in 1996 and signed the contract in which the parties first agreed to increase vacation pay from 40 hours to 50 hours for "all employees covered by this agreement," his receipt of only 40 hours pay put him on notice that there might be a violation. By inquiring further and "in the exercise of reasonable diligence," he and the Union would have uncovered sufficient facts to conclude that the Respondent had "modified" the vacation provision of the agreement. The Union was, thus, on notice of the violation the first time Miliner received vacation pay for less than 50 hours a week. An employee absence request form in evidence shows that Miliner requested 1 week's vacation to begin April 1, 1998, and that he was paid 40 hours for this week. No charge was filed within 6 months of this date.

The General Counsel might argue that the negotiation of a new agreement, effective on January 19, 1999, superseded any prior unlawful modification of the vacation provision because of the "zipper clause" in the agreement. Article G 15, section 1 provides that "[a]ll of the sections constitute the full and complete agreement between the parties and supersedes all prior understandings." Section 2 of that article prohibits individual agreements or understandings that would be inconsistent with the express terms of the agreement. Under this argument, the Respondent's failure to pay the mechanics and cleaners 50 hours per week of vacation after the effective date of the new agreement would be a new violation of the Act. However, Miliner was on notice of this new violation as soon as he received his first vacation pay for less than the contractual amount. The Respondent's records in evidence show that Miliner was "allowed" only 120 hours of vacation pay in calendar year 1999, the first year of the contract. Based on his length of service, he was entitled to 3 weeks vacation with pay. These records establish that the Respondent paid him only 40 hours per week of vacation in 1999. Moreover, the vacation requests submitted by Miliner in 1999 show that he took 12 vacation days in 1999, in individual increments, and was paid for 10 hours each day, i.e., 120 hours total. There is no dispute that the garage employees (mechanics and cleaners) were working 4 10-hour days a week during 1999. The General Counsel argues that the manner in which Miliner took his vacation in 1999, daily rather than weekly, and the Respondent's payment to him of 10 hours per vacation day, could have created confusion whether the Respondent was paying 40 or 50 hours per week of vacation.[10] Any such ambiguity, however, would have been resolved by the end of the year when Miliner had received all of his vacation pay and it totaled 120 hours and not 150 as apparently required by the contract. Again, he had enough facts

[10] This speculation by the General Counsel as to why the Union did not pursue the matter based on Miliner's receipt of vacation pay in 1999 is pure speculation in the absence of Miliner's testimony as to what he knew or did not know and what he did in response to these vacation payments in 1999. Once again, any inferences must be drawn against the General Counsel for failing to call Miliner to testify regarding these matters.

that, with the exercise of reasonable diligence, he would have known that the Respondent was not paying vacation in accordance with the plain language of the contract before January 1, 2000. The charge here was filed more than 6 months after Miliner would have been on notice of this unfair labor practice.

In reaching my conclusion that the complaint is barred by Section 10(b), I have also considered whether the Respondent's failure to pay the mechanics and cleaners 50 hours per week of vacation is a "continuing violation." A continuing violation is one where the respondent commits an unfair labor practice outside the 10(b) period that continues during the period. Although Section 10(b) would bar complaint and remedial relief for the conduct occurring more than 6 months before a charge is filed, relief may be sought for conduct within the 10(b) period which would constitute a separate and distinct substantive violation in its own right. *Farmingdale Iron Works, Inc.*, 249 NLRB 98 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981). A continuing violation is most often found in the context of an employer's failure to make periodic benefit payments during the term of a collective-bargaining agreement. The operative facts establishing the violation, i.e., the existence of the contract requiring the periodic payments and the respondent's failure to comply with its contractual requirements, is established from evidence of events within the 10(b) period. *Farmingdale Iron Works*, supra. This is to be distinguished from the situation where a discrete unfair labor practice, such as the refusal to execute a collective-bargaining agreement or the total repudiation of a contract, occurs outside the 10(b) period but has effects that continue during the 10(b) period. In those situations, where the conduct within the 10(b) period would only be unlawful by reference to events occurring outside the period, a complaint and remedy is precluded. *A & L Underground*, supra; *Chemung Contracting Corp.*, 291 NLRB 773, 774–775 (1988).

The alleged unfair labor practice here is the Respondent's failure to pay a segment of the bargaining unit vacation pay based on a schedule set forth in the contract. Because the contract was still in effect at the time the charge was filed, it could be argued that each time the Respondent paid an employee 40 hours instead of 50 hours for a week's vacation, it committed a separate and distinct violation of the Act. However, the Respondent's conduct in paying mechanics and cleaners the lesser amount was not a departure from the practice it had followed since acquiring the facility in 1989. Rather, the Respondent simply adhered to a method of calculating vacation benefits for its nondriving employees that had been established more than 6 months before the charge and had continued without change. This case is, thus, similar to the facts in *Continental Oil Co.*, 194 NLRB 126 (1971). There, the employer unilaterally implemented a method of equalizing overtime that clearly departed from the express terms of the collective-bargaining agreement more than 6 months before the charge was filed. The employer continued to follow this system during the 10(b) period without change. The Board found that each individual application of the unilaterally implemented contract modification did not constitute an independent unfair labor practice. I find that the Respondent's adherence, during the 10(b) period, to a different schedule of vacation benefits for nondriving employees than the schedule of benefits for "all employees" that appears in the contract was not a new and independent violation of the Act. The Respondent's conduct within the 10(b) period was merely the result of allegedly unlawful conduct that the Union was aware of, or should have been aware of in the exercise of reasonable diligence, more than 6 months before the charge was filed.

Unlike the continuing violation cases, the Respondent here did not totally repudiate the vacation provisions of the contract. It continued to pay vacation benefits to all unit employees and continued to pay the drivers 50 hours per week of vacation and nondrivers 40 hours per week of vacation based on its understanding of the contract as it had been applied since 1996 without complaint or protest from the Union. Under these circumstances, to permit litigation of the complaint based on a charge filed more than 6 months after the Union had clear and unequivocal notice of the Respondent's departure from the language of the contract would be contrary to the fundamental policies underlying the 10(b) limitation period. Accordingly, I shall recommend that the complaint be dismissed in its entirety.[11]

CONCLUSION OF LAW

The Respondent did not engage in any unfair labor practice, as alleged in the complaint, during the 6-month period prior to the filing of an unfair labor practice charge with the Board and service of a copy of such charge on the Respondent.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 14, 2001

[11] Although it is not necessary for me to resolve the issue, the apparent acquiescence by the president of the Charging Party in the Respondent's payment of different vacation benefits to nondrivers in the unit than those spelled out in the contract supports the Respondent's contention that the parties understood that the 50-hour per week vacation schedule in the contract applied only to drivers. Such a finding would also be supported by testimony of the Union's business agent, during rebuttal. In response to a question about the 1999 negotiations that eliminated the two-tier system, Rucker testified, "I recall that we wanted to take the two tiers away, out of the old contract, and we wanted a one package, one section for vacation, for all members, because *we never had a vacation in our contract that included mechanics and cleaners*. Always, before previous *was just designation for drivers* and the percentage of drivers for their mileage and everything." See, e.g., *Resco Products*, 331 NLRB 1546, 1548 (2000).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.